MOTION FILED

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No. 99-1178

In the
Supreme Court of the United States

SOLID WASTE AGENCY OF NORTHERN COOK COUNTY, *Petitioner,*

v.

UNITED STATES ARMY CORPS OF ENGINEERS, *et al., Respondents.*

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE OF NATIONAL ASSOCIATION OF HOME BUILDERS IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI

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MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE

Pursuant to Supreme Court Rule 37.3, the National Association of Home Builders (NAHB) respectfully moves for leave to submit the accompanying brief amicus curiae in support of Petitioner Solid Waste Agency of Northern Cook County's (SWANCC) Petition for Writ of Certiorari. Written consent for the filing of this brief was granted by counsel of record for SWANCC and Respondent United States Army Corps of Engineers (Corps). The consent letters have been filed with the clerk's office. Consent was withheld by Intervenor-Respondent City of Bartlett.

NAHB represents 200,000 builders, land planners, land developers, and industrial developers. With approximately 850 affiliated state and local associations in all fifty states, NAHB is the most influential trade association representing the nation's housing industry. Because NAHB members are involved in numerous projects throughout the country, NAHB has substantial experience with federal regulation of waters of the United States and can provide the Court with additional insight into the issue at bar.

The rule challenged in this case restricts the development potential of vast areas of land, so this Court's resolution of the issue presented is of great significance to NAHB and its members. A 1995 Corps study indicates that approximately 8.3 million isolated wetlands averaging one-fourth of an acre in size are scattered across 1,836,469 acres of the United States – enough land to affect a multitude of citizens and local governments. The migratory bird rule challenged here subjects these depressions to federal regulation simply because they are or could be used by birds. In the absence of the migratory bird rule, these eight million low spots would fall under the sole jurisdiction of states and local governments. Application of the migratory bird rule is therefore of great consequence to any person or

organization desiring to develop property that includes isolated wetlands or other isolated waters.

NAHB's strong and continuing interest in the issue presented in this case is demonstrated by NAHB's frequent participation in cases before the Court involving federal environmental regulation and land use issues. NAHB has appeared before the Court as amicus curiae in support of a prior petition for certiorari seeking to challenge the Corps' migratory bird rule. *See Cargill, Inc. v. United States*, 516 U.S. 955 (1995). In addition, NAHB has been before this Court either as amicus curiae in support of, or of counsel on behalf of, property owners in numerous prior cases involving government land use decisions. *See, e.g., City of Monterey v. Del Monte Dunes at Monterey Ltd.*, 119 S. Ct. 1624 (1999); *Suitum v. Tahoe Reg'l Planning Council*, 117 S. Ct. 1659 (1997); *Dolan v. City of Tigard*, 512 U.S. 374 (1994); *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992); *Yee v. City of Escondido*, 503 U.S. 519 (1992); *Nolan v. California Coastal Comm'n*, 483 U.S. 825 (1987); *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304 (1987); *MacDonald, Sommer & Frates v. County of Yolo*, 477 U.S. 340, *reh'g denied*, 478 U.S. 1035 (1986); *Williamson County Regional Planning Comm'n v. Hamilton Bank*, 473 U.S. 172 (1985); *San Diego Gas & Electric Co. v. City of San Diego*, 450 U.S. 621 (1981); *Agins v. City of Tiburon*, 447 U.S. 255 (1980). NAHB has also participated as amicus curiae in Endangered Species Act cases such as *Bennett v. Spear*, 117 S. Ct. 1154 (1997), and *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*, 515 U.S. 687 (1997). NAHB believes that its participation in this case is likewise warranted.

For the reasons stated above, NAHB respectfully requests that this Court grant its motion for leave to file this brief.

Respectfully submitted,

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The National Association of Home Builders respectfully files this brief as amicus curiae in support of Petitioner, Solid Waste Agency of Northern Cook County.[1]

INTEREST OF AMICUS CURIAE

The interest of Amicus Curiae National Association of Home Builders (NAHB) is set forth in the preceeding motion.

SUMMARY OF ARGUMENT

This case concerns the unsuccessful efforts of the Solid Waste Agency of Northern Cook County (SWANCC), a group of Illinois municipalities, to locate and develop a landfill for the citizens of northern Cook County. It involves the same legal issue that went unresolved in *United States v. Riverside Bayview Homes*, 474 U.S. 121, 131 n.8 (1985), and that the Court declined to consider in *Leslie Salt Co. v. United States*, 55 F.3d 1388 (9th Cir. 1995), *cert. denied*, 516 U.S. 955 (1995): Whether the Clean Water Act (CWA) and the Commerce Clause of the U.S. Constitution provide the Corps with authority to regulate isolated waters based on the use or potential use of those waters by migratory birds.

CWA Section 404 grants the Corps and the U.S. Environmental Protection Agency (EPA) authority to regulate the discharge of dredged or fill material into waters of the United States. The Corps and EPA by regulation have asserted jurisdiction over isolated waters "the use, degradation or destruction of which could affect interstate or foreign commerce." 33 C.F.R. § 328.3(a)(3) (1999). In the present case, the Corps determined that it

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[1] No counsel for either party authored this brief in whole or in part. No person or entity other than NAHB has made a monetary contribution to the preparation or submission of this brief.

had jurisdiction over the 17.6 acres of isolated waters on the property in question because of the so-called "migratory bird rule." Under the migratory bird rule, a wetland or small pond that is completely unrelated to commerce is deemed to have a sufficient effect on interstate commerce to trigger federal jurisdiction if the water is or would be used as habitat by migratory birds that cross state lines. The Corps denied SWANCC's applications for a permit to fill the 17.6 acres in question because it found that the isolated waters at the proposed site were used as habitat by migratory birds.

The question that the petitioner presents for review is whether the Commerce Clause and the CWA allow the Corps to employ the migratory bird rule to obtain jurisdiction over isolated waters. NAHB believes that this is a matter of sufficient importance to merit the Court's grant of SWANCC's petition for certiorari for at least three reasons.

First, the Seventh Circuit has decided an important question of federal law that has not been but should be decided by this Court. Federal regulation of isolated waters affects thousands of home builders, developers, and private property owners across the country. Whether such regulation is lawful and consistent with the intent of Congress is a question that is appropriate for this Court's consideration.

Second, the Seventh Circuit's decision conflicts with this Court's opinion in *United States v. Lopez*, 514 U.S. 549 (1995). The rationale adopted by the Seventh Circuit cannot be reconciled with the limits of Congress's Commerce Clause authority recognized by the Court in *Lopez*.

Third, the Seventh Circuit's decision conflicts with the holding of the U.S. Court of Appeals for the Fourth Circuit in *United States v. Wilson*, 133 F.3d 251 (4th Cir. 1997), which struck down the Corps regulation implicitly affirmed by the Seventh Circuit in this case. The Fourth Circuit took this action in order to avoid what it viewed as troubling constitutional questions. The Seventh Circuit

did not appear troubled in the least by the very same constitutional issues surrounding the Corps' regulation of isolated wetlands. This Court should resolve the conflict that lies at the heart of these two very different results.

ARGUMENT

I. CONSIDERING THE VAST EXTENT OF ISOLATED WETLANDS THROUGHOUT THE UNITED STATES, THIS COURT SHOULD DECIDE WHETHER THE MIGRATORY BIRD RULE IS THE PROPER TRIGGER FOR FEDERAL AUTHORITY OVER SUCH AREAS

The issue of federal regulation of isolated waters is a question of considerable concern to NAHB, its 200,000 members, and to the housing industry and homebuyers generally. Given the expansive definition used by the Corps to define wetlands and water bodies, builders encounter isolated wetlands and other isolated waters with considerable frequency. For example, the Corps has expanded the definition of "water body" to include areas that rarely contain water. *See, e.g., United States v. Phelps Dodge Corp.*, 391 F. Supp. 1181, 1187 (D. Ariz. 1975) (dry arroyos). The federal definition of "wetlands" is similarly expansive. According to the Corps, an area that is completely dry at the surface 365 days a year still can qualify as a wetland. *See* Environmental Laboratory, Department of the Army, Technical Rep. Y-87-1, Corps of Engineers Wetlands Delineation Manual 34-41 (Jan. 1987). Artificial areas, such as the remnants of a strip mining operation, are not excluded, and there is no minimum size requirement. Indeed, a 1994 study indicated that 15 percent of Section 404 individual permit applications processed by the Corps in 1992 had wetlands impacts less than one-tenth of an acre. Half of the applications involved impacts that were 1.1 acres or less. *See* Virginia

S. Albrecht & Bernard N. Goode, Wetland Regulation in the Real World 20, 22 (1994).[2]

A 1995 Corps study of isolated wetlands measuring less than one-half acre documents the migratory bird rule's importance in establishing federal jurisdiction over tiny, remote areas. The Corps' study did not include data from Louisiana, Michigan, New Jersey, Ohio, Texas, Washington, and West Virginia. It did not include isolated wetlands measuring one-half acre or larger, and it excluded "other waters" (such as ponds) that are not wetlands. Even with these omissions, the Corps' study found that there are 8,309,502 discrete isolated depressional areas meeting the federal wetlands definition scattered across 1,836,469 acres of the American landscape. *See* U.S. Army Corps of Eng'rs, 1995 Wetlands Delineation Field Evaluation Forms (June 1995) (1995 Corps Data Forms). The Corps' regulations state that it may assert jurisdiction over such isolated wetlands if the use, degradation, or destruction of those wetlands could affect interstate commerce. The Corps' regulations go on to specifically enumerate several categories of isolated waters that meet this test. Generally, the isolated waters identified in the Corps study are too small to attract interstate travelers for recreational purposes, to provide fish or shellfish for sale in interstate commerce, or to be used for industrial purposes in interstate commerce. *See* 33 C.F.R. § 328.3(a)(3)(i)-(iii). Thus, the migratory bird rule is the only route by which the federal government can assert jurisdiction over these areas.

This, however, is not a material limitation on the scope of the Corps' authority. Each of the eight million areas identified in the Corps' study, as well as innumerable "other waters," are susceptible to migratory bird use. *See, e.g., Hoffman Homes, Inc. v. Administrator*, 999 F.2d 256, 262 (7th Cir. 1993) (noting that "migratory

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2 One such project involved a proposed impact of 0.0006 acres, or about 26 square feet. This is about half the size of a ping-pong table.

birds can alight most anywhere" and citing testimony to that effect by a biologist with the U.S. Fish and Wildlife Service). As the Seventh Circuit itself noted, there are somewhere between 2.5 and 6 billion birds in the United States, two-thirds of which migrate. *See Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers*, 191 F.3d 845, 850 (7th Cir. 1999) (*SWANCC*). Nothing can prevent these birds from traveling throughout the Western Hemisphere and eventually alighting on any land or water in the United States. In one study, for example, researchers marked birds in North Dakota and later recovered them in 46 states, ten Canadian provinces and territories, and 23 other countries.[3] In addition, the migratory bird rule does not even require actual "use" by birds; potential use is sufficient, and there is no minimum standard for kind or frequency of use, or a requirement that a water be used by a particular type of migratory bird such as waterfowl. Thus, the migratory bird rule in practice provides the basis for the Corps to assert jurisdiction over virtually all of the 8 million depressional areas identified in its study. Clearly, the impacts of Corps jurisdiction based on the migratory bird rule are widespread.

For home builders, the consequences of federal regulation of isolated waters are all too concrete. The presence of a federally regulated isolated water on a development parcel means that the developer is left with a simple choice: avoid the regulated area and leave it in its natural state (and thereby give up what might otherwise be developable land), or obtain authorization in some form from the Corps to impact all or part of the area. Either course entails costs to the developer, costs

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3 See U.S. Fish & Wildlife Serv., Wetlands of the United States: Current Status and Recent Trends 1 (1984).

which are often reflected in increased housing prices.[4] Indeed, nearly ten years ago the Advisory Commission on Regulatory Barriers to Affordable Housing found that "environmental protection legislation and associated regulations dealing with wetlands often unnecessarily raise the cost of housing." Advisory Comm'n on Regulatory Barriers to Affordable Housing, "Not In My Back Yard": Removing Barriers to Affordable Housing (1991). This conclusion is still valid today.[5] Given these widespread economic impacts as well as the uncertainty among the lower courts discussed below regarding the extent of Corps jurisdiction, the important question of the extent of federal jurisdiction over isolated waters should be decided by this Court.

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[4] A recent study found that the average cost of preparing a Section 404 permit application is $271,596, which does not include the significant additional costs such as those associated with mitigation and the carrying costs of the land during a lengthy permitting process that takes an average of 405 days. *See* David Sunding and David Zilberman, Analysis of The Army Corps of Engineers' NWP Replacement Permit Proposal (2000).

[5] In fact, the Corps has substantially revised its nationwide permit program to make it more difficult for builders to obtain federal authorization to impact isolated waters. *See* 65 Fed. Reg. 12,818 (2000). Nationwide permits are general permits that are intended to provide a streamlined approval process for projects that would have minimal impacts on waters of the United States. Such permits have historically been widely used by home builders. Among other things, the Corps has eliminated Nationwide Permit 26, which authorized impacts of up to three acres of isolated wetlands and certain other waters of the United States for a single project, and replaced it with a new nationwide permit (No. 39) which limits impacts to only one-half acre of waters of the United States, a reduction of 84 percent in the acreage limit.

II. THIS CASE WARRANTS THIS COURT'S REVIEW BECAUSE THE LOWER COURT DECIDED AN IMPORTANT FEDERAL QUESTION IN A WAY THAT CONFLICTS WITH *LOPEZ* AND TRADITIONAL CONCEPTS OF FEDERALISM

A. The Seventh Circuit Misapplied the "Aggregate Effects" Doctrine in Determining Whether the Destruction of the Habitat of Migratory Birds "Substantially Affects" Interstate Commerce

The Corps' claimed authority to regulate isolated waters via the migratory bird rule extends far beyond the bounds of the Commerce Clause and is contrary to the principles articulated by this Court in *Lopez*. Like the gun control statute in *Lopez*, the migratory bird rule is not a regulation of the use of the channels of interstate commerce, nor is it an attempt to regulate an instrumentality of or thing in interstate commerce. Therefore, it can only be sustained if it regulates activities that substantially affect interstate commerce. *See Lopez*, 514 U.S. at 555-58. The activities being regulated here do not meet that test.

The Seventh Circuit made no attempt to determine whether the isolated waters that SWANCC proposed to fill substantially affect interstate commerce. Rather, the court found that although the effect of the destruction of migratory bird habitat is unobservable with respect to each isolated pond, the aggregate effect is clear: The resulting decrease in bird populations "substantially affects" interstate commerce. This, the Seventh Circuit reasoned, is all the Commerce Clause requires. *See SWANCC*, 191 F.3d at 850.

The Seventh Circuit's conclusion runs counter to *Lopez*, which - as the United States itself has recently acknowledged - ruled that regulation of intrastate economic activity is analyzed differently from the

regulation of intrastate non-economic activity.[6] *Lopez* stated that isolated incidents of intrastate non-economic activity cannot be aggregated to indicate a substantial effect on interstate commerce. *See* 514 U.S. at 559-61. In particular, the Court indicated that the effects of individual activities may be aggregated to achieve the required substantial effect on interstate commerce *only* where the activities in question are economic or commercial in nature or where the regulation in question is part of a larger regulation of economic activity. *See Lopez*, 514 U.S. at 561.[7] The migratory bird rule does not meet this test.

The activities in question here cannot be characterized as "economic" under the Court's Commerce Clause jurisprudence. When the Supreme Court has upheld federal regulation of intrastate activity "substantially affecting" interstate commerce, the cases have always involved activities or markets that were in and of themselves economic in nature, such as agriculture, the shipment of goods, or employment. *See e.g., Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985) (employment); *Hodel v. Indiana*, 452 U.S. 314 (1981)

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[6] During a recent oral argument before the Court, the Solicitor General stated that *Lopez* provided a four-part test for judicial scrutiny of legislation that neither regulates economic activity nor is itself part of a larger regulation of economic activity. *See United States v. Morrison*, Oral Argument Before the Supreme Court, 2000 WL 41232 at *7 (Jan. 11, 2000).

[7] Recently, the Third Circuit noted that courts, much like the Seventh Circuit, have adopted the general principle of *Wickard v. Filburn* – that repeated intrastate activity may substantially affect interstate commerce – in situations that are economically unlike *Wickard* and that require a chain of inferences before a connection between intrastate and interstate activity may be clearly drawn. *See United States v. Rodia*, 194 F.3d 465, 476-77 (3d Cir. 1999). The Third Circuit also observed that courts have applied the aggregation principle to all activities, both economic and non-economic, without acknowledging that *Lopez* approved of aggregation only in conjunction with economic activity. *See id.* at 477.

(coal mining); *Perez v. United States*, 402 U.S. 146 (1971) (loan sharking); *Maryland v. Wirtz*, 392 U.S. 183 (1968) (employment); *Katzenbach v. McClung*, 379 U.S. 294 (1964) (barbecue restaurant); *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241 (1964) (accommodations at inns and hotels); *Polish Nat'l Alliance v. NLRB*, 322 U.S. 643 (1944) (employment); *Wickard v. Filburn*, 317 U.S. 111 (1942) (commercial wheat farmer); *United States v. Wrightwood Dairy Co.*, 315 U.S. 110 (1942) (commercial milk sales); *Gibbons v. Ogden*, 22 U.S. 1, 9 Wheat. 1 (1824) (navigation). The discharge of dredged or fill material is not an economic activity in this sense. While discharges may be incidental to economic activities, they are not inherently economic in nature. They are more akin to the gun possession in *Lopez*, which was ultimately intended to lead to a commercial transaction (the sale of the gun) but which itself had no inherently economic dimension and which was found by the Court to be a non-economic activity.

In addition, this Court has indicated that even intrastate, non-economic activity may be regulated under the Commerce Clause in some circumstances. When an intrastate activity which is not in and of itself "economic" is "an essential part of a larger regulation of economic activity," it may "be sustained under [Supreme Court] cases upholding regulations of activities that arise out of or are connected with a commercial transaction, which viewed in the aggregate, substantially affects interstate commerce." *Lopez*, 514 U.S. at 561.

However, the prohibition on the presence of the development of a landfill site due to 17.6 acres of semi-aquatic property used by migratory birds cannot be sustained as "an essential part of a larger regulation of economic activity." Though wetlands are often filled to produce more economically viable areas, the Section 404 program cannot be characterized as a regulation of

economic activity. The program regulates a wide variety of activities, including many undertaken by homeowners or by government agencies in connection with the provision of recreational facilities, parks, and even wildlife refuges. Thus, the Section 404 program is not a regulation of a commercial market or a class of economic activities. Nor is the Clean Water Act generally a larger regulation of economic activity. Indeed, the purpose of the CWA is "to restore and maintain the chemical, physical, and biological integrity of the nation's waters," 33 U.S.C.A. § 1251(a) (1999), not to regulate markets or commercial activities.

Thus, because the regulation of isolated waters is not a regulation of economic activity and is not part of a larger regulation of economic activity, *Lopez* does not permit the Corps to establish the requisite substantial effect on interstate commerce by aggregating the effects of impacts to all isolated waters. The Seventh Circuit's decision to the contrary is therefore in conflict with *Lopez*.

Moreover, the Seventh Circuit's approach is at odds with this Court's mandate that the analysis of substantial effects not be carried to the point that federal regulation obliterates the distinction between what is national and what is local. *See Lopez*, 514 U.S. at 557. A loose application of the aggregation principle such as that engaged in by the Seventh Circuit would bring all isolated waters under the coverage of the migratory bird rule. If the Corps can regulate, in the aggregate, waters that are or could be used as habitat by migratory birds, it most certainly can regulate "individual members" of that class. While the Seventh Circuit purported to impose limits on the Corps' jurisdiction by citing a definition of habitat ("the place where a plant or animal species naturally lives or grows[,]" Websters Third New Int'l Dictionary 1017 (1993)), such a limitation is an empty gesture. Birds are everywhere; as previously noted, there are somewhere between 2.5 and 6 billion birds in the United States, two-thirds of which migrate. Moreover, birds can and do live anywhere, including a wide variety of urban and suburban environments. Therefore,

allowing the Corps to regulate the habitat of migratory birds gives the Corps carte blanche to regulate any isolated water it chooses, effectively giving the Corps land use control over millions of acres of property under the guise of regulating "navigable waters."

Lopez does not permit such an interpretation of the aggregation principle. In fact, in *Lopez*, the Court cited several cases indicating that although modern precedent has expanded congressional power under the Commerce Clause, such power is not without limits. *See Lopez*, 514 U.S. 556-57 (1995). In *Jones v. Laughlin Steel Corp.*, 301 U.S. 1, 37 (1937), the Court explained that the interstate commerce power may not be extended to cover such indirect and remote effects on interstate commerce as to "'effectively obliterate the distinction between what is national and what is local and create a completely centralized government." In *Maryland v. Wirtz*, 392 U.S. 183, 197 n.27 (1968), in response to the dissent's position that Congress could regulate and control even the minutest activities affecting commerce, the majority declared that neither in *Wirtz* nor in *Wickard* had the Court allowed a relatively trivial impact on commerce to provide Congress an excuse for broad general regulation of state or private activities. In light of the Court's rationale in *Lopez*, *Laughlin Steel*, and *Wirtz*, the Seventh Circuit should not have allowed Congress' regulatory power under the Commerce Clause to be stretched far enough to allow the Corps to regulate minute, isolated waters using the migratory bird rule. In fact, the same rationale, if left unchecked, would permit Congress to assert control over all land and establish itself as a super zoning authority with nationwide jurisdiction. As discussed further below, such a result could hardly be countenanced.

In short, the Seventh Circuit's decision to uphold the Corps' assertion of jurisdiction over isolated wetlands

because of the aggregate effects of impacts on habitat for migratory birds conflicts with this Court's reasoning in *Lopez*. In no way is the prohibition on filling the waters at issue in *SWANCC* capable of characterization as a commercial regulation or as part of a larger regulation of economic activity.

B. The Migratory Bird Rule Undermines the Requirement that a Regulation Contain a Jurisdictional Element that would Ensure, Through Case-by-Case Inquiry, that the Activity Being Regulated Affects Interstate Commerce

Even though it regulates non-economic, intrastate activity, the migratory bird rule could still fall within the bounds of Congress' Commerce Clause authority if it contained an appropriate jurisdictional element requiring that the requisite interstate commerce connection be determined on a case-by-case basis. *See Lopez*, 514 U.S. at 561-62. Although the Corps regulation that the migratory bird rule purports to interpret contains a jurisdictional element, *see* 33 C.F.R. § 328.3(a)(3) (federal jurisdiction extends to waters only if their use, degradation or destruction could affect interstate commerce), this jurisdictional element cannot rescue the migratory bird rule from constitutional infirmity.

First, the test set forth in the migratory bird rule does not appropriately limit the universe of waters that are made subject to regulation because the rule purports to encompass both areas that are used as habitat by migratory birds as well as areas that could be used. In other words, the jurisdictional element covers those areas with only a potential link to migratory bird use and therefore a potential link at best with interstate commerce. There is no requirement that the Corps demonstrate that the isolated water has been used in a way that would even begin to establish any connection with interstate commerce, much less a substantial

connection. Moreover, unlike other jurisdictional elements that have been held sufficient by courts to sustain statutes against constitutional challenges, *see e.g., United States v. Bass*, 404 U.S. 336 (1971), the jurisdictional element in this case is not found in the statute but in the regulations and therefore may be changed at the whim of the agency. Thus, the jurisdictional element in the Corps regulations cannot save the migratory bird rule.

C. By Using the Migratory Bird Rule to Claim Jurisdiction over Intrastate Property, the Federal Government Has Displaced Traditional State Jurisdiction Over Land Use.

The migratory bird rule warrants particularly careful scrutiny by this Court because, in determining whether development may occur in particular areas, the federal government treads upon ground traditionally reserved to the states by the Tenth Amendment. *See Lopez*, 514 U.S. at 583 (Kennedy, J., concurring) (intrusion on state sovereignty requires a "stronger connection" with commercial concerns central to the Commerce Clause, or the intrusion "contradicts the federal balance the Framers designed").

The use of real property is a traditional State concern. *See Fidelity Federal Sav. & Loan Ass'n v. De la Cuesta*, 458 U.S. 141, 153 (1982). In particular, States are regarded as the proper governing body to enact and enforce property laws concerning land use planning. *See Dolan v. City of Tigard*, 512 U.S. 374, 384 (1994) (authority of state and local governments to engage in land-use planning has been sustained against constitutional challenge as long ago as the decision in *Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926)); *see also California Coastal Comm'n v. Granite Rock Co.*, 480 U.S. 572 (1987) (state land-use law applicable to federal land). Moreover, decisions regarding local land use "properly rest with the community that is ultimately - and intimately - affected." *Gardner v. City of Baltimore*, 969 F.2d 63, 68 (4th Cir. 1992).

Thus, zoning and other aspects of land use regulation "are particularly within the province of local legislative authorities." *Warth v. Seldin*, 422 U.S. 490, 508 n.18 (1975); *see also Evans v. Board of County Commissioners*, 994 F.2d 755, 761 (10th Cir. 1993) (land use policy is a feature of local government and an area in which the tenets of federalism are particularly strong).

The Corps has taken the position that simply because migratory birds inhabit the property that SWANCC intended to develop as a landfill, SWANCC is prohibited from using it. As a result, the Corps has effectively overridden the plan developed by 23 municipalities to address a local issue as basic as where to dump their garbage, in the process disrupting local land-use plans and zoning decisions and diminishing local governments' ability to address an issue of vital concern to citizens. This intrusion is antithetical to fundamental principles of federalism and violates the mandate of the Tenth Amendment. *See Lopez*, 514 U.S. at 576 (Kennedy, J., concurring) (quoting *New York v. United States*, 505 U.S. 144, 181 (1992)) ("'[T]he Constitution divides authority between federal and state governments for the protection of individuals. State sovereignty is not just an end in itself: Rather, federalism secures to citizens the liberties that derive from the diffusion of sovereign power.'"); *New State Ice Co. v. Liebmann*, 385 U.S. 262, 311 (1932) (Brandeis, J., dissenting) (as a "social laboratory," states have the ability to react to local problems in a manner best adapted to local needs). States must not be prohibited from "exercising their own judgment in an area to which States lay claim by right of history and expertise [through regulation of] an activity beyond the realm of commerce in the ordinary and usual sense of that term." *See Lopez*, 514 U.S. at 583 (Kennedy, J., concurring).

By utilizing the migratory bird rule to exercise jurisdiction over intrastate, isolated waters, the federal government has effectively preempted traditional state

authority over the use of millions of acres of land.[8] In the absence of the migratory bird rule, these areas would be subject to the wetlands laws enacted by many states and over 5,000 local governments.[9] Unfortunately, where property contains isolated waters as defined by the federal government, state and local governments cannot implement their land use regulations until the federal government approves of the local development projects – a textbook violation of the basic principles of federalism.

When Congress enacted the CWA, it attempted to preserve the authority of the States, stating that "[i]t is the policy of the Congress to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce and eliminate pollution, to plan the

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[8] As an example of the broad reach of the federal program, consider the State of Georgia's approximately 240,000 isolated wetlands that are each less than one-half acre. *See* 1995 Corps Data Forms. The migratory bird rule provides the federal government with 240,000 opportunities to trump State and local authorities in their traditional role as regulators of land use.

[9] Many states have their own wetland protection statutes. *See, e.g.*, Conn. Gen. Stat. §§ 22a-28 to -45a (2000); Fla. Stat. Ann. §§ 373.414 - .421 (2000); Me. Rev. Stat. Ann. tit. 38, §§ 480-A to -Z (2000); Mass. Gen. Laws Ann. ch. 131, §§ 40, 40A (2000); Mich. Comp. Laws §§ 324.30301 - .30323 (2000); Minn. Stat. § 103G.222 - .2373 (2000); N.H. Rev. Stat. Ann. §§ 482-A:1 - :27 (2000); N.J. Rev. Stat. §§ 13:9B-1 to -30 (2000); N.Y. Envtl. Conserv. Law §§ 24-0101 to -1305 (2000); Vt. Stat. Ann. tit. 10, § 1272 (2000). Many of these statutes provide for local regulation or management of isolated waters and wetlands. *See, e.g.*, Conn. Gen. Stat. § 22a-42; Me. Rev. Stat. Ann. tit. 38, § 480-F; Minn. Stat. § 103G.2243; N.Y. Envtl. Conserv. Law § 24-0501. For examples of local ordinances or by-laws regulating isolated waters and wetlands, *see* Sacramento, Cal. General Plan CO-96 (1993); Broward County, Fla., Code §§ 27-331 to -350 (1993); *Lovequist v. Conservation Comm'n of Dennis*, 393 N.E.2d 858 (Mass. 1979); *Biggs v. Town of Sandwich*, 470 A.2d 928 (N.H. 1984); *see also* Hearings on S. 1304 Before the Subcomm. On Clean Water, Fisheries and Wildlife of the Senate Comm. On Environment and Public Works, 103d Cong., 1st Sess. (1993) (statement of National Association of State Departments of Agriculture) available in LEXIS, Legis Library, Cngtst File (noting that over 5,000 local governments have adopted wetland protection regulations).

development and use (including restoration, preservation, and enhancement) of land and water resources." 33 U.S.C.A. § 1251(b) (1999). Congress also did not extend regulation to many known sources of water pollution, such as runoff from agricultural and silvicultural operations. Similarly, Congress excluded groundwater from the CWA's coverage because it wanted to avoid involving the federal government in complex state jurisdictional rules. *See* S. Rep. No. 414, 92nd Cong., 1st Sess. 73 (1971); 118 Cong. Rec. 10,699 (1972). Congress also enacted Section 208 to encourage the States to develop and implement waste treatment management plans that would cover pollution sources not regulated by federal law. *See* 33 U.S.C.A. § 1288 (1999). Congress clearly tried to balance federal regulatory authority where necessary to protect strictly federal interests, while promoting a voluntary federal-state partnership in matters beyond the reach of the federal government, and preserving State authority elsewhere.

The migratory bird rule nullifies this balance, extending federal authority to more than eight million isolated depressions, most of which would be covered under State or local regulations. Accordingly, this Court should inhibit the blurring of the federal and State spheres of power, *see Lopez*, 514 U.S. at 577 (Kennedy, J., concurring), by granting SWANCC's petition for certiorari and addressing this issue.

III. SUPREME COURT GUIDANCE IS NEEDED TO RESOLVE DIVISION AMONG THE COURTS OF APPEALS

The issue of the proper scope of federal jurisdiction over isolated waters has split the three courts of appeals that have reviewed it. The division between the Fourth, Seventh, and Ninth Circuits is an independent and legitimate basis for Supreme Court review of the Corps' use of the migratory bird rule to assert jurisdiction over isolated waters.

In *Hoffman Homes, Inc. v. Administrator*, 961 F.2d 1310, 1316 (7th Cir 1992), *vacated*, 975 F.2d 1554 (7th Cir. 1992), *administrative order for penalties vacated*, 999 F.2d 256 (7th Cir. 1993), the Seventh Circuit first held that the CWA was never intended to reach isolated wetlands and that Corps and EPA jurisdiction over such wetlands exceeded Congress' Commerce Clause power. On rehearing, two of the panel's judges held that the waters' connection to interstate commerce could be established through use by migratory birds, while the third judge remained of the view that the migratory bird rule exceeded the scope of the Corps' authority. *See id at 261.* The Seventh Circuit again upheld the migratory bird rule in *Rueth v. United States*, 13 F.3d 227 (7th Cir. 1993), and in this case.

The Ninth Circuit also has upheld the validity of the migratory bird rule, though not without reservation. It explained that although there is no suggestion in the CWA that isolated waters used by migratory birds are covered by that Act, the CWA's policy of protecting wildlife "could plausibly be read to stretch this far," while acknowledging that the migratory bird rule "certainly tests the limits of Congress's commerce powers and, some would say, the bounds of reason." *Leslie Salt v. United States*, 55 F.3d 1388, 1394-1396 (9th Cir. 1995). The court reasoned that though the CWA does not mention isolated wetlands, legislative history from 1972 provides support for the proposition that Congress intended the CWA's jurisdiction to reach waters of the United States to the maximum extent possible under the Commerce Clause. *See id.* at 1394-95. This Court elected not to grant certiorari in *Leslie Salt*, though Justice Thomas dissented from the denial. *See Cargill, Inc. v. United States*, 516 U.S. 955 (1995). He would have granted certiorari to resolve whether the possibility of a visit from or the occasional presence of migratory birds creates a sufficient nexus with interstate commerce to permit Corps regulation. *See id.* at 956.

The Fourth Circuit recently issued a decision that cannot be reconciled with the Seventh Circuit rulings and *Leslie Salt*. In *United States v. Wilson*, 133 F.3d 251, 253 (4th

Cir. 1997), the defendants, who were convicted of felony violations of the CWA for knowingly discharging fill material into wetlands without a permit, challenged, among other things, the validity of 33 C.F.R. § 328.3(a)(3), which defines "waters of the United States" as waters whose use, degradation, or destruction "could affect" interstate commerce. The Fourth Circuit noted that the regulation does not require that the regulated activity have a substantial effect on interstate commerce nor that the waters at issue have any nexus with interstate waters. *See id.* at 257. If this regulation were a statute, the court stated, it would "present serious constitutional difficulties" because it exceeds Congress' authority under the Commerce Clause. Noting that the CWA should be interpreted "in light of the constitutional difficulties that would arise by extending the Act's coverage to waters that are connected closely to neither interstate nor navigable waters, and which do not otherwise substantially affect interstate commerce," the court explained that "[a]bsent a clear indication to the contrary, we should not lightly presume that merely by defining 'navigable waters' as 'the waters of the United States,' Congress authorized the Army Corps of Engineers to assert its jurisdiction in such a sweeping and constitutionally troubling manner." *Id.*

The *Wilson* court stated that one would expect that the term "waters of the United States," when used to define the phrase "navigable waters," would refer to waters that, if not navigable in fact, are at least interstate or closely related to interstate or navigable waters. However, because 33 C.F.R. § 328.3(a)(3) includes intrastate waters that need have no connection whatsoever to navigable or interstate waters, it expands the term "waters of the United States" beyond permissible limits. Accordingly, the court held 33 C.F.R. § 328.3(a)(3) invalid. *See id.*

The Seventh Circuit in *SWANCC* stated that *Wilson* is factually distinct, and therefore inapplicable. *Wilson*, the court reasoned, involved a challenge to 33 C.F.R. § 328.3(a)(3), which defines the term "waters of the United

States" to include all waters whose use or degradation could affect interstate commerce. The *Wilson* court, according to the Seventh Circuit, had found the regulation to be invalid because Congress does not have the authority to regulate waters that "could" affect interstate commerce. *See SWANCC*, 191 F.3d at 851-52. The Seventh Circuit also attempted to distinguish *Wilson* by reasoning that the facts in *SWANCC* demonstrate that filling the 17.6 acres at issue would have an immediate effect on the migratory birds that use the area; there was no reason to speculate as to whether filling the semi-aquatic area and thus harming migratory birds "could" affect interstate commerce. The Seventh Circuit also reasoned that SWANCC, unlike the appellant in *Wilson*, had not attacked 33 C.F.R. § 328.3(a)(3). Rather, it confronted an interpretation of the regulation, *i.e.*, the migratory bird rule. *See id.* at 852.

The Seventh Circuit's attempt to explain away *Wilson* does not withstand scrutiny. First, though the facts may have indicated that migratory birds would be negatively affected if the 17.6 acres at issue were filled, the court never explained how such harm to migratory birds would have any effect on interstate commerce. As Justice Thomas noted in his dissent in *Cargill*, 516 U.S. at 959, the record did not show that humans ever visited the relevant property to hunt, trap, or observe migratory birds, or that petitioner's activities would harm any birds. Moreover, besides the occasional presence of migratory birds, there was no evidence that the land at issue would have any effect whatsoever on interstate commerce. Given the Fourth Circuit's view of the "constitutional difficulties that would arise by extending the [CWA's] coverage to waters . . . which do not . . . substantially affect interstate commerce," *Wilson*, 133 F.3d at 258, it is clear that the Fourth Circuit would have been equally troubled by the assertion of jurisdiction in this case, evidence of actual bird use notwithstanding.

Second, it makes no sense to distinguish an agency's regulation from an interpretation of that

regulation and claim that even if the regulation is invalid, an interpretation or clarification of that regulation can still be upheld. The *Wilson* court would not have upheld the migratory bird rule as an interpretation of the term "waters of the United States" after finding the underlying regulation (33 C.F.R. § 328.3(a)(3)) constitutionally troubling. Moreover, application of the migratory bird rule provides an even broader interpretation of "waters of the United States" as it merely requires that water have a potential connection to migratory birds rather than a potential connection to interstate commerce. Clearly, *Wilson* cannot be distinguished.

This court should not tolerate a circuit split on an issue as vital as the reach of federal jurisdiction under the CWA. States, municipalities, developers, and home builders are entitled to the benefits of uniform application of the CWA and its regulations in each of the fifty states. The success of development projects should not ride on whether the State in which the development will take place follows *Wilson* or the Seventh Circuit's decision in *SWANCC*.

CONCLUSION

For the foregoing reasons, the Court should grant the petition for a writ of certiorari in this case.

Respectfully submitted,

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